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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES MICHAEL GANNON,

Defendant and Appellant.

F075682

(Super. Ct. No. BF163970A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant James Michael Gannon of one count of lewd and lascivious acts with a child under the age of 14 (Pen. Code, § 288, subd. (b);¹ count 1),

¹ Undesignated statutory references are to the Penal Code.

with an enhancement for the acts occurring during the commission of a residential burglary (§ 667.61, subd. (e)(2)), and one count of first degree residential burglary (§ 460, subd. (a); count 2). The court sentenced Gannon to a term of 25 years to life on count 1. A six-year sentence on count 2 was stayed.

On appeal, Gannon alleges his trial counsel was ineffective in failing to object to the admission of a record of prior conviction, admitted pursuant to Evidence Code section 1108, and in failing to object to a jury instruction on flight. He also contends the court prejudicially erred in denying his request for an instruction on trespass.

We reject these contentions and affirm the judgment.

FACTUAL BACKGROUND

Gannon entered a home in a residential neighborhood in Bakersfield in the middle of the night. The home was occupied by individuals unknown to him, including four young children. While there, Gannon removed his shoes and jacket, ate chips and drank juice. He eventually proceeded down a hallway where he entered the room of Jane Doe,² a 12-year-old girl. Jane awoke to find Gannon in her bed. He told her to be quiet, and he put his hand over her mouth. He asked whether she could see him or describe him if asked by the police and, when she said yes, he removed her glasses. After substantial time and discussion, he put his hand between her thighs and said, “Open.”

At that point, Jane screamed and rolled off the bed. Her mother, Brenda C., soon entered the room, where she found Gannon and told him to get out. Gannon asked Brenda for a baseball cap to disguise his distinctive hairstyle. Brenda walked Gannon to the front of the house, where he retrieved a bottle of orange juice from the refrigerator. He retrieved his shoes and jacket and removed an empty grapefruit juice bottle from his jacket and put it on a bookcase. He asked Brenda to give him time to get out of the

² To protect the privacy of the victim and witnesses, their names have been anonymized or abbreviated. No disrespect is intended.

house. When Brenda told him she was going to start screaming and would call 911 he left. An empty orange juice bottle was left in the street. Gannon could not be excluded as a contributor of DNA on the orange and grapefruit juice bottles.

Gannon testified in the defense case. He explained he did not have a permanent residence at the time of the incident and was staying with friends or in shelters. That night, he was thirsty after a long walk and entered the backyard of Jane's residence to try to drink water from a hose. Once there, he looked through a sliding glass door and saw a refrigerator in an illuminated kitchen. He then determined he would try to get something to drink and eat from the refrigerator. The sliding door was unlocked. Gannon admitted he entered the home, where he removed his shoes and jacket, drank juice, and ate chips.

After several minutes, Gannon decided to use the restroom. At that point, he noticed someone (revealed through other testimony to be Brenda) sleeping on the living room couch and someone else (revealed through other testimony to be Jane's brother) playing video games in another room. Gannon resolved to try to find another exit from the home and proceeded down a hallway. He entered Jane's room, where he saw a dog. Believing the dog would start barking, he grabbed the dog and climbed into Jane's bed. Gannon admitted to much of his conversation with Jane but denied putting his hand between Jane's thighs or telling her, "Open."

Later in his testimony, Gannon testified he entered the home only to drink water and did not think of taking food or anything else until he opened the refrigerator.

DISCUSSION

I. Admission of Prior Conviction

Gannon contends his trial counsel was ineffective in failing to object to the admission of a 17-page docket pertaining to his 2013 conviction for disorderly conduct by committing a lewd act in a public place in violation of section 647, subdivision (a).

A. Additional Factual Background

Gannon moved in limine to exclude his prior criminal record and any evidence sought to be introduced pursuant to Evidence Code section 1108. The prosecution moved in limine to admit this evidence. At issue was evidence regarding a specific incident involving a minor named Savannah G. and Gannon's related conviction.

At a pretrial hearing, Savannah G. testified Gannon was her stepfather's best friend. When Savannah was 14 years old, Gannon came into her room in the early morning hours, asked whether she would like him to get on top of her and whether she would like to make some money, and offered her \$40. The court determined evidence regarding these underlying acts was admissible pursuant to Evidence Code section 1108,³ a determination Gannon does not now dispute. Savannah later testified to these facts at trial. Her testimony is not challenged.

However, in the pretrial discussions, the court had concerns regarding the admissibility of Gannon's related conviction. The court noted Gannon initially was charged with annoying or molesting a child under the age of 18 in violation of section 647.6, subdivision (a)(1), which offense is deemed a sexual offense by Evidence Code section 1108. (Evid. Code, § 1108, subd. (d)(1)(A).) However, Gannon ultimately pled to disorderly conduct by committing a lewd act in a public place in violation of section 647, subdivision (a), which the Evidence Code does not specifically deem a sexual offense that may be admissible. The court noted the record of conviction had probative value because it supported a conclusion a conviction arose from the conduct Savannah testified to. However, the court ruled the conviction would be excluded unless an issue arose as to whether the prior conduct leading to the conviction occurred.

³ Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

During Gannon's direct testimony at trial, he acknowledged he went into Savannah's room as alleged, but testified he did so because he thought he heard voices in her room and thought she might have snuck someone into the house. He denied making the statements Savannah claimed. He testified he settled a criminal case arising from this conduct because he could not afford to fight it.

Off the record, the court then revisited the issue of the admissibility of the conviction. On the record, the prosecutor stated his intent to admit the conviction and his understanding the court had ruled in chambers he would be permitted to do so. The court did not disagree.

Later, the prosecutor indicated he had a certified docket pertaining to the conviction, which he would provide to counsel. When the prosecutor stated he was unsure whether defense counsel had any objection to him proving the conviction through the docket, the court stated, "We'll cross that road when we get there[.]"

The prosecutor then proceeded to question Gannon, who acknowledged he was convicted of violating section 647, subdivision (a). Gannon again testified he could not afford to fight the case and did not believe the public defender could provide adequate representation.

During a subsequent break in testimony, the prosecutor moved to admit into evidence the docket pertaining to the conviction. The court granted the motion without further discussion and the docket was admitted.

B. Applicable Law

1. Evidence of Other Sexual Offenses

Evidence of prior misconduct is generally inadmissible to prove conduct on another specified occasion or to prove a person's disposition to commit such an act. (Evid. Code, § 1101, subd. (a).) However, in a sex offense case, Evidence Code section 1108 permits admission of evidence of a defendant's commission of another sexual offense for the purpose of showing propensity to commit such crimes. (Evid.

Code, § 1108, subd. (a).) Both charged and uncharged prior sexual offenses may be admitted under this provision. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 917-918 (*Falsetta*); *People v. Villatoro* (2012) 54 Cal.4th 1152, 1160, 1164 (*Villatoro*).)

The admission of prior sex offense evidence must be evaluated pursuant to Evidence Code section 352 to determine whether the probative value of the evidence is substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (Evid. Code, §§ 352, 1108, subd. (a); *Falsetta, supra*, 21 Cal.4th at p. 907.) Undue prejudice arises if the evidence “ ‘poses an intolerable “risk to the fairness of the proceedings or the reliability of the outcome.” ’ ” (*People v. Eubanks* (2011) 53 Cal.4th 110, 144.) The potential for such prejudice is decreased when testimony describing the defendant’s other acts is “ ‘no stronger and no more inflammatory than the testimony concerning the charged offenses.’ ” (*Ibid.*)

A trial court’s ruling admitting evidence under Evidence Code sections 352 and 1108 is reviewed for abuse of discretion. (*People v. Daveggio & Michaud* (2018) 4 Cal.5th 790, 824; *People v. Clark* (2016) 63 Cal.4th 522, 586.)

2. Ineffective Assistance of Counsel

“ ‘[A] defendant claiming a violation of the federal constitutional right to effective assistance of counsel must satisfy a two-pronged showing: that counsel’s performance was deficient, and that the defendant was prejudiced, that is, there is a reasonable probability the outcome would have been different were it not for the deficient performance.’ ” (*People v. Woodruff* (2018) 5 Cal.5th 697, 736 (*Woodruff*).) “If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel’s performance was deficient.” (*People v. Sapp* (2003) 31 Cal.4th 240, 263.) “Rarely is ineffective assistance of counsel established on appeal since the record usually sheds no light on counsel’s reasons for action or inaction.” (*Woodruff, supra*, at p. 736.)

C. Analysis

Although somewhat unclear, Gannon appears to claim his counsel should have objected to evidence regarding his conviction, generally, and also should have objected to the conviction being proved through a 17-page docket regarding the proceedings on the conviction. He points out the docket contained information regarding the dismissed charge under section 647.6, and his placement on probation with a suspended sentence. He contends this information was irrelevant, cumulative, confusing, and unduly prejudicial.

We first consider whether counsel was ineffective in failing to object to the admission of evidence that Gannon was convicted in relation to his conduct with Savannah G., and specifically to the admission of evidence he was convicted of a violation of section 647, subdivision (a). Counsel moved in limine to exclude this evidence and the court initially ruled in Gannon's favor, with the caveat the ruling would change if the defense presented evidence to suggest the conduct leading to the conviction had not occurred. Ultimately, Gannon testified the alleged conduct had not occurred and the court revised its ruling. We do not know whether counsel objected at that time because the discussions were held off the record but counsel did not memorialize any objections during later, on-the-record discussions. Regardless, however, counsel was well aware of the basis for the court's ruling and had made a record of her objections during motions in limine. We cannot say that counsel's performance was deficient.

We also find no error in the court's revised ruling. Gannon denied he engaged in the conduct testified to by Savannah. A conviction resulting from that conduct was relevant to Gannon's credibility on that point. Evidence of the specific code section he was convicted under was less probative, particularly considering the offense is not deemed a sexual offense by Evidence Code section 1108. However, we cannot say the court abused its discretion in concluding the nature of the conviction had some relevance in light of Gannon's testimony he received a "deal" to settle the case. Additionally, we

do not think the jury would have been confused by Gannon's conviction for lewd acts in a public place, even though the incident occurred in Savannah's bedroom. It was undisputed this conviction arose out of the incident with Savannah and the discrepancy is explained by Gannon's own testimony that he took a "deal" in part to avoid being convicted of a sexual offense.

On the other hand, we agree with Gannon that much of the 17-page certified docket of conviction entered into evidence was irrelevant. For example, there was no probative value to the minutes of each and every court proceeding Gannon attended. At the same time, however, this evidence was not prejudicial. There is nothing inflammatory about it. To the extent it was erroneously admitted, it was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836 [reviewing court considers whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error].)

The two specific aspects of the docket Gannon challenges – the initial charge for violation of section 647.6 and the disposition of the case – do not warrant reversal. Evidence of the charge was evidence Gannon had been charged with a sexual offense as defined in Evidence Code section 1108. He did not have to be convicted of that offense for the charge to be relevant. (*Falsetta, supra*, 21 Cal.4th at pp. 917-918.) Furthermore, that charge was far less inflammatory than the conduct at issue in the instant case. (*Id.* at p. 924.) Thus, even if the court abused its discretion in admitting the charge, Gannon was not prejudiced thereby.

We likewise find admission of the disposition to be harmless. By way of this evidence, the jury was informed Gannon was punished for his crime against Savannah G. by being placed on probation, the terms of which also were included in the docket. (*Falsetta, supra*, 21 Cal.4th at pp. 917-918; *Villatoro, supra*, 54 Cal.4th at p. 1160.) It is true the prosecutor argued this disposition meant Gannon "suffered no consequences" from his offense against Savannah G. However, given the strength of the admissible

evidence, we conclude it is unlikely the jury was motivated to convict Gannon simply because he did not suffer a prison term for his prior conviction. (See *Falsetta, supra*, at pp. 924-925.) To reiterate, Gannon acknowledged he got into bed with Jane and Jane testified Gannon put his hand between her thighs and said, “Open.” Savannah testified to her prior encounter with Gannon, which was admitted to show Gannon’s intent and his propensity to commit such an act. To the extent the court abused its discretion in admitting evidence Gannon was placed on probation in his prior case, this evidence was harmless.

II. Denial of Instruction on Trespass

Gannon contends the trial court prejudicially erred in denying his request for a jury instruction on criminal trespass. Jury instructions were discussed in chambers and off the record. During later, on-the-record discussions, the court indicated defense counsel had requested an instruction on criminal trespass as a lesser included offense to the charge of residential burglary. The court denied that request on the ground criminal trespass was not a lesser included offense. Defense counsel was invited to make a record of her objections but declined further comment.

“Under California law, trial courts must instruct the jury on lesser included offenses of the charged crime if substantial evidence supports the conclusion that the defendant committed the lesser included offense and not the greater offense.” (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196.) “[H]owever, trespass is a lesser *related* offense, not a lesser *included* offense, of burglary.”⁴ (*People v. Foster* (2010) 50 Cal.4th 1301, 1343.) The court correctly ruled Gannon was not entitled to an instruction on trespass as

⁴ Gannon cites *People v. Waidla* (2000) 22 Cal.4th 690, 733 (*Waidla*), for the proposition that trespass may be a lesser included offense of burglary, depending on how the matter is pled. *Waidla* did not so hold. Gannon cites language from *Waidla* in which the court summarized the defendant’s argument, which the court accepted for purposes of discussion and then determined to be inapplicable.

a lesser included offense. Gannon also concedes the court had no duty to instruct on trespass as a lesser related offense. (*People v. Birks* (1998) 19 Cal.4th 108, 136 (*Birks*).)

Nonetheless, Gannon contends he was entitled to an instruction on his theory of the case and failure to so instruct violated his federal constitutional rights. Gannon did not raise this argument in the trial court. In any event, “ ‘ “a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury’s understanding of the case.” ’ ” (*People v. Covarrubias* (2016) 1 Cal.5th 838, 873.) This duty extends to instructions on defenses that comprise the defendant’s theory of the case and that are supported by the evidence. (*Ibid.*) It does not require the court to instruct on lesser related offenses sua sponte. To hold otherwise would contravene *Birks*. (See *Birks*, *supra*, 19 Cal.4th at p. 136.)

Regardless, Gannon’s defense theory was that he entered the residence to drink water and did not form the intent to drink juice or eat food until he was already inside. We note Gannon’s testimony in this regard was not so clear. Although he did, at one point, testify he only intended to drink water, he also testified he saw the refrigerator from outside the residence and decided to see if he could get something to drink, and maybe something to eat.

In any event, we must agree with the People that even Gannon’s stated intent to drink water is substantial evidence of his intent to commit larceny, an element of the burglary charge. (§ 459 [“Every person who enters any house ... with intent to commit grand or petit larceny ... is guilty of burglary.”]; § 490a [“Whenever any law or statute of this state refers to or mentions larceny, embezzlement or stealing, said law or statute shall hereafter be read and interpreted as if the word ‘theft’ were substituted therefor.”].) To constitute theft, the property at issue need only have some intrinsic value, however slight. (*People v. Martinez* (2002) 95 Cal.App.4th 581, 586 (*Martinez*).) Case law supports the conclusion that even the minimal intrusion of taking water constitutes larceny under the law. (*In re Leanna W.* (2004) 120 Cal.App.4th 735, 742 [entry with the intent to use the

home's utilities may form the basis for a burglary conviction]; *Martinez, supra*, at pp. 584-586 [entering home to take shower, which would use soap, shampoo, and water, is sufficient to show intent to commit larceny]; *People v. Dingle* (1985) 174 Cal.App.3d 21, 29 [intent to enter home to make unauthorized long distance call amounted to intent to commit larceny]; *People v. Franco* (1970) 4 Cal.App.3d 535, 542 [empty cigarette carton had sufficient intrinsic value to support larceny finding]; see *People v. Vasquez* (2015) 239 Cal.App.4th 1512, 1519 [burglary conviction based in part on theft of shower water].) Gannon cites no case to the contrary.

Finally, we note the jury also found Gannon guilty of an enhancement to count 1, that the lewd and lascivious acts occurred during the commission of a residential burglary. (§ 667.61, subd. (e)(2).) The jury plainly concluded the elements of section 459 had been proven beyond a reasonable doubt. Given this finding, there is no substantial likelihood the jury would have reached a different verdict on count 2 had it been instructed on trespass.

III. Instruction on Flight

Gannon contends his trial counsel was ineffective in failing to object to an instruction on flight. He contends the instruction was unwarranted because there was not substantial evidence he fled the scene to avoid apprehension.

The trial court instructed the jury with CALCRIM No. 372, as follows: “If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself.”

“ ‘In general, a flight instruction “is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.” ’ [Citations.] Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest ‘a

purpose to avoid being observed or arrested.’ [Citations.] To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence.” (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

The evidence supported such findings and inferences here. There is no dispute Gannon left the scene. Moreover, the preceding circumstances were sufficient to suggest his purpose was to avoid being observed or arrested. When Gannon encountered Jane, he removed her glasses so she would be unable to see him. By his own admission, Gannon asked Brenda for a baseball cap so he could avoid detection by the police based on his distinctive haircut. He admitted he wanted to conceal his appearance to avoid being caught. He also told Brenda she needed to give him some time to leave the residence. Although Gannon delayed his departure from the residence, he left once Brenda stated she was going to scream and call 911. Gannon’s actions reflect a clear purpose of avoiding apprehension. A reasonable juror could conclude from the evidence that Gannon left the residence for precisely that purpose.

The jury also was instructed, “Some of these instructions may not apply, depending on your findings about the facts of the case.” We presume the jury is capable of understanding and correlating the court’s instructions, and of disregarding an instruction if it finds the evidence does not support its application. (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 278; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) The instructions left it to the jury to resolve questions regarding the existence and significance of Gannon’s flight. The jury was free to find Gannon did not flee, or that his flight did not reflect on his consciousness of guilt.

For the same reasons, we reject Gannon’s claim that the instruction violated his constitutional rights because it lessened the prosecution’s burden of proof and permitted the jury to make unfounded logical inferences. Both arguments are predicated on the claim the instruction is unsupported by the evidence. As stated, we reject this contention

and find the evidence sufficiently supported an inference of flight to warrant giving the instruction.

DISPOSITION

The judgment is affirmed.

SNAUFFER, J.

WE CONCUR:

FRANSON, Acting P.J.

SMITH, J.